(38)

Office - Supreme Court, U. S.
FILED
NOV 30 1943
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 517

PEN-KEN GAS & OIL CORPORATION,
Appellant,

vs.

WARFIELD NATURAL GAS COMPANY,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

JAMES A. COSGROVE,
National Press Bldg.,
Washington, D. C.
Attorney for Petitioner.

GILBERT F. WAGNER,
GEORGE F. CALLAGHAN,
105 West Adams Street,
Chicago, Illinois,
Of Counsel.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

INDEX

	PAGE
Opinions Below	1-2
Jurisdiction	2
Statutes and Rules Involved	2-3
Questions Presented	3-4
Reasons for Granting the Writ	5-7
Brief in Support of Petition	8-31
Argument	14

SUMMARY OF ARGUMENT.

I. A summary judgment proceeding can never be sustained where there is a controverted question of fact and if it becomes necessary for the court to weigh the evidence the motion for the summary judgment must be denied 14-16

II. Where a special State Statute as to the forfeiture to the State of title in lands for non-payment of taxes prescribes the procedural steps to be taken to legally effect and record such forfeiture, the fact of literal compliance with those prerequisites must appear of record to give the court jurisdiction 16-19

III. Where a special statute requires the recording of a forfeiture judgment and a sale for cash and an accounting to the owner of record, the mere rendering of the forfeiture judgment without recording and without sale and without accounting to the owner, does not

PAGE

divest the owner of his title and interest in said land, nor can such judgment be set up as a bar to the owner or one holding through him to assert his rights of ownership in the land 19-22

IV. Where a special State Statute of forfeiture to the State of title in lands for non-payment of taxes prescribes a series of procedural steps to be taken to effect and record such forfeiture, and that Statute is repealed before all of such steps have been taken, without a saving clause in favor of pending actions, any judgment rendered under the repealed Statute may not be set up as a bar to the right of the owner, or one holding title through such owner, to assert his right of ownership in the land 23

V. Where one section of a State Statute provides for "actual" and personal service upon non-residents whose addresses are known, and another section for "constructive" service upon non-residents whose addresses are unknown, the trial court does not obtain jurisdiction by constructive service of non-residents whose addresses are known 24-25

VI. The judgment of forfeiture of title limited to lands in one county of the State of Kentucky does not operate to forfeit title to all lands of the same parties defendant in all counties of the State in an action brought under the forfeiture act of the State of Kentucky 25-28

VII. The judgment of this court sustaining the constitutionality of the Kentucky Forfeiture Statute may not be relied upon as a basis for a factual finding that the judgment of the Pike Circuit Court forfeiting the lands embodied within the Haskell Grant to the Commonwealth of Kentucky was valid in all particulars

PAGE

and that plaintiff and its predecessors in title therefore had no interest in the lands covered by the grant.... 29

VIII. A judgment in a forfeiture proceeding under the Forfeiture Act of Kentucky may not be relied upon as constituting a divesting of the property right of the owner of lands with respect to which he has paid the taxes for three of the five years prescribed by the Forfeiture Act 29-30

Appendix ..... a to i

CASES CITED.

American Ins. Co. v. Gentle Bros. Co. (C. C. A., 5th Fla. 1940), 109 Fed. (2nd) 732, 60 S. Ct. 1075, 310 U. S. 633, 84 L. Ed. 1403 14

Applegate v. Lexington & Carter Co. Mining Co., 117 U. S. 255 ..... 6, 18

Bradstreet v. Insurance Co., 3 Sumn. 601 6

Commonwealth v. Gatliff, 116 S. W. 363, 132 Ky. 95.... 26
Commonwealth v. Cornett, 146 Ky. 45, 141 S .W. 366 26

Eastern Ky. Coal Lands Corp. v. The Commonwealth, 219 U. S. 140 ..... 4, 6, 10, 26

Erie R. Co. v. Tompkins, 304 U. S. 64 21

Dairy Engineering Corp., Ltd. v. DeRaef Corp. (D. C. Mo. 1941), 1 F. R. D. 679 ..... 14, 28

Davidson v. Lewis, Judge, 159 Ky. 798, 169 S. W. 538.... 21

Flinn v. Blakeman, 254 Ky. 416, 71 S. W. (2) 951 21

Fordson Coal Co. v. Mills, 234 Ky. 64, 27 S. W. (2) 382 21

Heine v. U. S., C.C.A. 6th, 135 Fed. (2nd) 914 ..... 5, 18

PAGE

Johnson v. Jarvis, 223 Fed. 756 ..... 5, 18

Keyes v. State, 121 Maine 306 22-23

Ky. Union Co. v. Commonwealth, 128 Ky. 610, 108 S. W. 931 21

Lockard v. Commonwealth, 118 S. W. 331, 133 Ky. 369 26

Moorman v. Taylor, 255 Ky. 347 ..... 5, 18

Port of Palm Beach Dist. v. Goethals (C. C. A. 5th, Fla. 1939), 104 Fed. (2nd) 706 ..... 14, 28

Schultz v. Manufacturers & Traders Trust Co., 1 F. R. D. 45 15

So. Carolina v. Gaillard, 101 U. S. 433, 428 23

Thevenin v. Lessee of M. D. Slocum, 16 Ohio 519 ..... 22, 23

U. S. v. Newbury Mfg. Co. (D. C. Mass., 1941), 1 F. R. D. 718 ..... 14, 28

Weisser v. Mussam, 127 Fed. (2nd) (C. C. A. 2nd), 344, 346 ..... 14, 28

Whiteman v. Federal Life Ins. Co. (D. C. Mo. 1939), 1 F. R. D. 95 ..... 14, 15, 28

Windsor v. McVeigh ,93 U. S. 274, 23 L. Ed. 914 6

Wyant v. Crittenden, 113 Fed. (2d) 170 (C.C.A., D.C.) .. 14-15

STATUTES CITED.

Rule 56 (c) of the Rules of Civil Procedure for the District Court of the United States 2

Section 56 of the Civil Code of Practice of Ky., Ch. II, Art. 1 2

PAGE

Section 57 of the Civil Code of Practice of Ky., Ch. II, Art. 2 3

50 Corpus Juris, p. 498, Sec. 107 25

50 Corpus Juris, p. 496, Sec. 105 25

50 Corpus Juris, p. 516, Sec. 150 25

Chap. 22 of the Act of the General Assembly of 1906, Carroll's Statutes (Synopsis) .....a to i

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

NO.

PEN-KEN GAS & OIL CORPORATION,
Appellant,

vs.

WARFIELD NATURAL GAS COMPANY,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, by its attorney of record, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above entitled cause.

Opinions Below.

The Opinion of the District Court of the United States for the Eastern District of Kentucky was rendered on Feb-

ruary 3, 1942, and is reported in 2nd Fed. Rules, Dec. p. 355 (R. 286). The Opinion of the Circuit Court of Appeals (R. 335) is reported in 137 Fed. (2nd) 871. An additional opinon on rehearing appears in 137 Fed. (2nd) 885 (R. 401).

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended. The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on August 31, 1943.

Statutes and Rules Involved.

Rule 56 (c) * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Act Relating to Revenue and Taxation, being Chap. 22 of the legislative acts of the Commonwealth of Kentucky, adopted in 1906, a synopsis of which is set forth in the Appendix.

Section 56 of the Civil Code of Practice of Kentucky, Chap. II, entitled Service of Summons, Article 1, Actual Service, Section 56,

> "Non-residents, except infants. * * * If a defendant be out of this State the plaintiff may take a copy of the petition, certified by the clerk, with a summons annexed thereto, warning him to appear and answer the petition within sixty days after the same shall have been served upon him, and may cause a copy thereof to be delivered to such defendant by a person to whom he is personally known. Proof of the delivery shall

be made by the affidavit of the person making it, indorsed on or annexed to the certified copy and summons, in which the time and place of the delivery, and the fact that the defendant was personally known to the affiant shall be stated."

Chapter II, Service of Summons, Article 2, Constructive Service, Section 57,

"Constructive service; warning order. If the defendant be—

"7. Warning order; when to be made. If his name and place of residence be unknown to the plaintiff, the clerk shall, subject to the provisions of Section 58, make upon the petition an order warning the defendant to defend the action on the first day of the next term of the court, which does not commence within sixty days after the making of the order."

Questions Presented.

I. When the pleadings and contradictory affidavits of the parties establish that there are genuine issues on material facts may the trial court enter summary judgment?

I (a) When there is no clear showing that no genuine issue as to material facts remains for trial may summary judgment be entered?

II. When a special Statute state as to forfeiture to the State of title in lands for non-payment of taxes directs the manner of effecting and recording such forfeiture, and the record is silent as to a compliance with those prerequisites, may the court indulge in a presumption of such compliance?

III. When a special State statute requires in a forfeiture proceeding, a recording of the forfeiture judgment, a sale of the land for cash and an accounting to the owner

of record, may the owner of record, or one holding title through such owner, be held to have been divested of all his title and interest in and to said land, upon a mere showing of a forfeiture judgment alone, with no recording, no sale and no accounting?

IV. Where a special State statute of forfeiture to the State of title in lands for non-payment of taxes prescribes a series of procedural steps to be taken to effect and record such forfeiture, including the recording of the judgment and sale, and such statute is repealed, without a saving clause in favor of pending actions, before there has been a completion of the forfeiture by recording of the judgment or a sale, may that forfeiture be set up as a bar to the right of the owner of record, or one holding title through such owner, to assert his rights of ownership in the land?

V. Where one section of a State statute provides for "actual" and personal service on non-residents whose addresses are *known*, and another section for "constructive" service upon non-residents whose addresses are *unknown*, does the trial court obtain jurisdiction of a non-resident whose address is known where the service is by the constructive and not by the actual process?

VI. Does the judgment of forfeiture of title to lands described as located in one County of the State of Kentucky operate to forfeit the title to all lands of the parties defendant in other Counties of the State, in an action brought under the Forfeiture Act of the State of Kentucky?

VII. May the decision of this court in *Eastern Kentucky Coal Lands Corporation* v. *The Commonwealth*, 219 U. S. 140, affirming the judgment of the Pike Circuit Court in

the same case (111 S. W. 362), be relied upon as authority for the factual determination that the judgment of the lower court forfeiting the lands embodied within the Haskell grant to the Commonwealth of Kentucky, was valid in all particulars and that appellant and its predecessors in title had no interest in the lands covered by the grant?

VIII. May a judgment in a forfeiture proceeding under the Forfeiture Act of Kentucky be relied upon as constituting a divesting of the property right of the owner with respect to lands on which taxes had been paid for three of the five year period prescribed in the Forfeiture Act?

Reasons for Granting the Writ.

1. The Circuit Court of Appeals of the 6th Circuit has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings in the application of the rules governing summary judgment as to call for an exercise of this court's supervision.

2. The decision of the court below constitutes an affirmance and approval of the decision of the lower court in depriving this petitioner of its property rights on the basis of a series of unwarranted presumptions without due process of law.

3. The decision of the court below, that a literal or substantial compliance with the procedural prerequisites of the Forfeiture Act of Kentucky, in the original proceeding, must be presumed, in the absence of proof of non-compliance, is in direct conflict with the decision of the same court in *Heine* v. *U. S.*, C. C. A. 6th; 135 Fed. (2d) 914; the decision of the C. C. A. for the 4th Circuit, in *Johnson* v. *Jarvis*, 223 Fed. 756; the decision of this

court in *Applegate* v. *Lexington & Carter Company Mining Company*, 117 U. S. 255; and the decision of *Moorman* v. *Taylor*, 255 Ky. 347; and is in direct conflict with the generally accepted legal principle that judgments without notice to the parties in interest are "mere mockeries and in no sense judicial proceedings," but "mere arbitrary edicts or substantial frauds."

Bradstreet v. *Insurance Co.*, 3 Sumn. 601 quoted in *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914.

4. The conclusion of the court below, that "the record of the forfeiture suit in evidence ends with the mandate of the Supreme Court" in the case of *Commonwealth* v. *Eastern Kentucky Coal Lands Corporation* (217 U. S. 140) and that plaintiff and its predecessors in title therefore had no interest in the lands, is an erroneous application of the decision of this court in that proceeding.

5. The court below indulged in the unwarranted process of supplying an additional finding of fact that, "There is no showing of record that Boyd had any interest in the land at the time of, or subsequent to, the commencement of the future action," and this in the light of the uncontradicted and undenied facts of record that (a) the taxes against the Haskell grant were assessed in 1903-04 against Boyd and Selden (R. 254-55); (b) the taxes paid upon the Haskell grant in 1901 were paid and a receipt (in evidence R. 261) given to Boyd and Selden (R. 261), and (c) other tax receipts were at one time in the possession of the plaintiff covering the years 1895 to 1908, inclusive, for taxes assessed upon the Haskell grant (R. 257) and taxes in fact were paid for three years of the five-year period.

6. A conservative estimate of the value of the min-

eral deposits, natural gas and other property taken from the lands of this petitioner is in excess of seventy million ($70,000,000) dollars and the right of this petitioner to be reimbursed for this unlawful taking and to be restored to its rightful position as owner will be lost without the aid and assistance of this court.

7. The issues involved relate to the general principles of legal procedure in forfeiture proceedings and are of wide general interest and of grave importance.

8. If the decision of the Circuit Court of Appeals is to stand, it will leave the law in hopeless state of confusion as it is contrary to the law as decided by this Court, the Court of Appeals of Kentucky and the decisions of other Circuit Courts of Appeals.

9. The decision of the court below has so far sanctioned a departure from the accepted and usual course of judicial proceedings, with respect to the property rights of this petitioner and all persons subject to the forfeiture provisions of state laws as to call for an exercise of this court's power of supervision.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

JAMES A. COSGROVE,
National Press Bldg.,
Washington, D. C.
Attorney for Petitioner.

GILBERT F. WAGNER,
GEORGE F. CALLAGHAN,
105 West Adams Street
Chicago, Illinois,
Of Counsel.